Nos. 87-1589 and 87-1888

IN THE
*SUPREME COURT OF THE UNITED STATES*
October Term, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
*Respondent.*

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
INTERSTATE COMMERCE COMMISSION,
*Respondents.*

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

# REPLY BRIEF FOR PETITIONER

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## ARGUMENT

### I. NOTHING IN THE RAILWAY LABOR ACT RESTRICTS MANAGEMENT'S FUNDAMENTAL RIGHT TO DECIDE WHETHER TO STAY IN BUSINESS

As respondent Railway Labor Executives' Association ("RLEA") notes in its brief, "[r]ailroads have been expanding, contracting and going out of business virtually since the inception of the industry . . . ." RLEA Br. at 12. Until the district court issued its decision in this case, however, no court had ever held that railroads were required to exhaust the bargaining procedures of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), before taking such fundamental actions. Congress clearly intended -- and rail labor has never before disputed -- that the regulatory procedures of the Interstate Commerce Commission ("ICC") provide the sole constitutional means by which rail labor can influence a railroad's decision to go out of business. Neither the provisions of the RLA nor its legislative history warrant an interpretation of the scope of management's rights under that statute that is diametrically opposite the understandings expressed by this Court in cases decided under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). The RLA, like the NLRA, does not prevent an employer from making fundamental changes in the scope and direction of its business notwithstanding that such changes will have some impact on its employees.

#### A. The Right To Make Decisions Regarding The Scope And Direction Of The Business Enterprise Is Not Unique To NLRA Employers

As noted in The Pittsburgh & Lake Erie Railroad Company's ("P&LE") Opening Brief at 18-21, this Court has recognized that a collective bargaining agreement does not constitute a guarantee of employment, *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); that an employer has an "absolute right" to go out of business for any reason, *Textile Workers v. Darlington Manufacturing Co.*, 380

U.S. 263, 268 (1965) ("*Darlington*"); and that a decision to shut down part of a business is not part of an employee's "wages, hours, and other terms and conditions of employment," *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981) ("*First National Maintenance*"). In *Darlington* and *First National Maintenance*, this Court upheld the employer's right to implement its decision despite the plain fact that employees would lose their jobs as a result of the employer's action. *See* 380 U.S. at 267 n.6; 452 U.S. at 677. A requirement that P&LE bargain over the effects of its decision to go out of business before implementing its decision would be diametrically opposite to the principles underlying *Darlington* and *First National Maintenance*.

Recognizing this, RLEA contends that the teachings of those cases are inapplicable here because of "crucial differences" between the NLRA and the RLA. While this Court has cautioned that NLRA principles cannot be "imported wholesale" into the RLA, *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969), the mere fact that the two labor statutes differ in certain respects does not automatically render NLRA principles inapplicable in RLA cases. It would be as unwise to reject NLRA principles out of hand because of irrelevant differences between the two statutes as it would be to apply such principles where the differences are relevant. Indeed, this Court has found NLRA precedent helpful in several cases arising under the RLA. *See, e.g., Jacksonville Terminal Co.*, 394 U.S. at 383 ("The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act . . . and we do so again here.").

The first "crucial difference" between the two statutes that RLEA identifies is that "[u]nlike the NLRA, the Railway Labor Act was designed to apply to a heavily *regulated* industry . . . ." RLEA Br. at 17 (emphasis in original). RLEA contends that *Darlington* cannot apply here because unlike other employers, railroads were never free to go out of business. RLEA Br. at 19-21. That a railroad must seek ICC approval to go out of business, however, does not suggest that it has any greater duty to



bargain with its unions over that decision than would an employer not subject to ICC regulation. If anything, the fact that Congress has chosen to vest the ICC with plenary authority to regulate a railroad's exit from the industry -- including the determination of whether to impose labor protective benefits as a condition of its approval -- weighs against inferring any obligation to bargain with its unions at all. *See infra* at 29-31; *see also* United States Br. at 18-21. Rail labor, like management, comes into the railroad industry knowing that the ICC will have the final say on when and on what terms the railroad will be permitted to go out of business, and rail labor also knows that the ICC's authority extends to the determination of what employee protections are consistent with the public interest, and hence should be imposed as a condition of its approval. The regulated nature of the railroad industry simply does not justify an inference that Congress intended to require railroads to satisfy the processes of two statutory regimes, the ICA and the RLA, before going out of business.[1]

RLEA also contends that the RLA "was intended by Congress to prevent strikes by eliminating the need to strike," RLEA Br. at 17, and that the breadth of the bargaining and status quo obligations under the RLA are materially different from those under the NLRA.[2] *Id.* The only significant difference between the NLRA and the RLA that RLEA identifies, however, is in the *length* of the status quo obligation. The NLRA, like the RLA, precludes either party from making unilateral changes to the status

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[1] RLEA's attempt to distinguish the railroad industry on the basis of ICC regulation also fails because the NLRA also applies to many regulated industries, such as trucking, communications, maritime, and gas and electric utilities.

[2] The purposes of the NLRA and the RLA are not materially different. *Compare First National Maintenance*, 452 U.S. at 674 ("A fundamental aim of the [NLRA] is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. . . . Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.") *with Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 148 (1969)("The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.").

quo without first exhausting the bargaining procedures under the applicable statute. *See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S. Ct. 830, 833 n.5 (1988). Under the NLRA, however, the parties are required to bargain only to impasse, a process that may take only a few days. Under the RLA, the parties are required to exhaust an "almost interminable" bargaining process that frequently takes years to complete. *See* P&LE Br. at 22-23 & n.6. Certainly, the potential length of the status quo period under the RLA gives a party resisting change greater leverage in bargaining under that statute than it would have under the NLRA. But the difference in the *length* of the status quo period under the two statutes implies, if anything, that the scope of mandatory bargaining is narrower under the RLA.

Here, the only relevant comparison between the NLRA and the RLA is between the operative statutory language describing the scope of bargainable subjects under each statute. Section 6 of the RLA, 45 U.S.C. § 156, requires an employer to bargain over "rates of pay, rules, or working conditions." Section 8(d) of the NLRA, 29 U.S.C. § 158(d), requires bargaining over "wages, hours, and other terms and conditions of employment." As explained in P&LE's Opening Brief at 24 n.8, the drafters of the NLRA believed the term "conditions of employment" used in the NLRA to be broader than the term "working conditions" used in the RLA.[3] If, as this Court held in *First National Maintenance*, a decision to shut down part of an operation does not constitute a change in "wages, hours, and conditions of employment," it cannot constitute a change in the narrower "rates of pay, rules or working conditions." RLEA's attempt to read a broader bargaining

[3]Similarly, the term "wages" has been held to be broader than the term "rates of pay" used in the RLA. *Inland Steel Co. v. NLRB*, 170 F.2d 247, 255 (7th Cir. 1948), *aff'd sub nom. American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). The doctrine of *noscitur a sociis* militates against interpreting "working conditions" in a way that is significantly broader than the clearly narrow terms "rates of pay" and "rules" with which it appears. *Cf. Texas & N.O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 568 (1930).



obligation into the language of Section 2, First, RLEA Br. at 17 n.12, fails because neither the admonition "to exert every reasonable effort" to make and maintain agreements nor "to settle all disputes" whatever their source expands the scope of what may be a mandatory subject of bargaining under Section 6.[4]

There are no differences between the NLRA and the RLA that would prevent this Court from applying NLRA principles under the circumstances of this case. A railroad no less than any other employer has a need -- and a right -- to make fundamental decisions regarding the scope and direction of its operations free of union interference. The concept of managerial prerogative that this Court has recognized in its decisions under the NLRA should apply with equal force here.[5]

[4]By comparison, Section 8(d) of the NLRA, which also contains an admonition analogous to RLA Section 2, First, provides that the parties' duty to bargain collectively entails "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . ." 29 U.S.C. § 158(d).

[5]Contrary to RLEA's contention that the NLRA distinction between mandatory and permissive subjects of bargaining is inapplicable under the RLA, RLEA Br. at 16-18 & n.13, such a distinction is entirely consistent with the purposes and provisions of the RLA. The subjects over which the parties are required to bargain under Section 6 were plainly not intended to include all possible subjects over which disputes might arise. *Cf. First National Maintenance*, 452 U.S. at 674-75. RLEA's suggestion that only an administrative agency is capable of drawing the "subtle differences" between the two types of bargaining is unsupported by any authority and is contrary to experience. *See, e.g., ALPA v. United Airlines Inc.*, 802 F.2d 886, 902 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 51-52 (2d Cir. 1976); *Elgin, Joliet & Eastern Ry. v. Brotherhood of Railroad Trainmen*, 302 F.2d 540, 543-44 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962).

### B. The Legislative History Does Not Establish Any Intent To Require A Railroad To Bargain Over A Decision To Go Out Of Business

This Court stated in *Darlington* that the proposition that a businessman could not choose to go out of business if he wanted to "would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent . . . ." 380 U.S. at 270. RLEA purports to find such a "clear manifestation" of legislative intent in the legislative history of the RLA. The legislative excerpts relied on by RLEA, however, do not support its argument.

Conceding that the sale of P&LE would not *violate* the agreements, RLEA, like the court of appeals, argues that the loss of jobs following the sale would nevertheless *change* the agreements. RLEA Br. at 27. Both RLEA and the court of appeals apparently believe that the loss of jobs constitutes a change in "working conditions." Nothing in the legislative history supports this conclusion. The selections from the 1924 hearings on the Howell-Barkley bill merely confirm that Section 2, First and Section 6 were intended to prevent unilateral changes concerning "rates of pay, rules or working conditions," and shed no light whatsoever on whether Congress believed that the loss of jobs as a result of a decision to go out of business would constitute such a change.

RLEA also asserts that Section 2, Seventh of the RLA, which was added to the Act in 1934, "laid to rest" any questions regarding whether Sections 2, First and 6 prohibited unilateral changes in existing agreements. RLEA Br. at 31-32. In support of this claim, RLEA traces the 1934 amendments to the RLA to the 1933 Amendments to the Bankruptcy Act of 1898 and the Emergency Railroad Transportation Act ("ERTA"), and attempts to find in the legislative history of these two statutes a congressional intent to bring changes in the scope and direction of railroad operations within the reach of the RLA. RLEA Br. at 32-33.



RLEA's attempt to bolster its argument with this material is unpersuasive. The 1933 Amendments to the Bankruptcy Act of 1898 were passed, in part, to address the fears of both rail labor and Congress that a trustee or a bankruptcy court would unilaterally alter an agreement that existed between a bankrupt carrier and its employees. The amendments, especially Section 77(o) upon which RLEA places great emphasis, made the RLA applicable to courts and receivers so that the collective bargaining agreements would be "carried into effect and . . . respected by a receiver operating a railroad." 76 Cong. Rec. 5118 (remarks of Sen. Norris). The "central purpose" of the amendments was to "make it possible for [railroad] reorganizations and readjustments to be effected." *Id.* at 5355 (remarks of Rep. Sumner). The only way that the amendments benefited rail labor was through the assurances that pre-bankruptcy contracts signed by the employees would not "be changed by the judge who [had] charge of the bankruptcy proceeding," *id.* at 5359 (remarks of Rep. Cooper), and that "[t]he same law that exists . . . for operating railroads [was] made applicable to trustees." *Id.* at 5358 (remarks of Rep. LaGuardia). While RLEA implies that these amendments clarified the meaning of the RLA's status quo and bargaining obligations, RLEA Br. at 32-33, in fact the amendments merely made those requirements applicable to trustees and courts during a bankruptcy proceeding. Neither the text nor the legislative history of the Bankruptcy Act amendments suggests that Congress intended to expand the scope of the RLA bargaining obligation.

RLEA's "examination" of the language and legislative history of ERTA is equally flawed. RLEA contends that ERTA demonstrates a "clear congressional intent to give rail labor a broad role in entrepreneurial decisions." RLEA Br. at 33. Once again, RLEA attempts to color this narrow and specific legislation as a broad grant of power to rail labor and an intentional curtailment of management rights. However, the legislative history does not support RLEA's characterization.

ERTA was designed to address the Depression's devastating impact on the railroad industry. *See* E. Latham, *The Politics of*

*Railroad Coordination 1933-1936* 8 (1959). ERTA had "three main purposes": (1) "to promote economies, particularly the avoidance of unnecessary waste resulting from competition"; (2) to promote financial reorganization of the carriers; and (3) to investigate other methods to improve transportation by rail and other forms of transport. S. Rep. No. 87, 73d Cong., 1st Sess. (1937), *reprinted in* 77 Cong. Rec. 4251 (1933). A federal coordinator was appointed who had vast powers over the business affairs of the nation's railroads, including the power to oversee and order railroad consolidation. In order to further the first purpose behind ERTA, railroads were required to "avoid unnecessary duplication of services and facilities . . . and . . . other waste and preventable expense." *Id.*

Section 7 of ERTA was intended to provide some degree of protection from the impact that the consolidations and reorganizations envisioned by ERTA were expected to have on affected employees. For example, Section 7(a) provided that the coordinator had to "confer" with rail labor before taking any action that affected the interests of employees. However, the opportunity to "confer" meant only the opportunity to be heard before the coordinator could issue an order that affected employee interests. As RLEA's spokesman, Donald R. Richberg, testified at the hearings on ERTA, Section 7(a) "simply . . . put in labor as having participated in the plan." *Hearings on S. 1580 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 1st Sess. 99 (1933). The coordinator did not have to follow the suggestions made by labor representatives and could, in fact, override such suggestions. *Id.* (remarks of Sen. Couzens). The key provision in ERTA protective of labor's interest, which was not mentioned in RLEA's brief, was contained in Section 7(b). This provision froze the level of employee terminations to the number "as shown by the payrolls of employees in service during the month of May 1933." 48 Stat. 214. The provision fell far short of the protection rail labor desired. Latham, at 72. Thus, while RLEA attempts to paint ERTA as granting labor a "broad role" in the entrepreneurial



control of the industry, in fact it did nothing of the sort.[6] ERTA was quite simply "emergency legislation" that addressed a "critical" situation -- the Depression. 77 Cong. Rec. 4872 (remarks of Rep. Shoemaker).

RLEA's mischaracterization of the role and power of labor under ERTA and the Bankruptcy Act infects its further claim that in the 1934 Amendments to the RLA Congress included the "substance" of ERTA and Section 77(o) of the Bankruptcy Act in a new Section 2, Seventh of the RLA. RLEA Br. at 35. However, the legislative history of the 1934 amendments includes virtually no mention of Section 77(o). At the hearings RLEA refers to, Joseph Eastman discussed Sections 77(p) and (q) of the Bankruptcy Act and Section 7(e) of ERTA as examples of Congress' realization that "specific provisions against interference with freedom of choice in the selection of labor representatives should be applied to all railroads, as well as to those which happened to be under control of judges, receivers, or trustees." *Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 12 (1934). Eastman referred to anti-interference provisions of ERTA and the Bankruptcy Act as support for his recommendation that the RLA be amended to provide protection for employees' rights to organize and be repre-

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[6]During the debates on the bill it was stated that "[t]his bill does nothing for labor . . . It freezes the situation at its lowest ebb." 77 Cong. Rec. 4872 (remarks of Rep. Maloney). As finally adopted, ERTA had limited employee protections, and the RLA was made applicable to Section 7 solely to "discourage the use of 'yellow dog' contracts" and to make sure the RLA requirements that applied to trustees and courts under the Bankruptcy Act amendments applied under ERTA as well. 77 Cong. Rec. 4860. ERTA, like the Bankruptcy Act amendments, merely extended the RLA into special legislation without explaining, much less expanding, the scope or nature of the RLA's obligations.

sented. As a result of those hearings, Sections 2, Third and 2, Fourth of the RLA were placed in the permanent law. [7]

Further, RLEA intimates that the version of Section 2, Seventh that Eastman supported was what Congress ultimately adopted in the 1934 amendments, with a few minor changes added for "definiteness" and "clarity."[8] RLEA Br. at 35. The changes added by the carriers' representative were deemed minor by those in attendance at the hearings, since they reflected the intent of Eastman's proposed Section 2, Seventh. RLEA seeks to gloss them over since changes made in the final bill undercut RLEA's theory and mischaracterization of Eastman's version of Section 2, Seventh.[9] The legislative history of the 1934 amendments does not reveal any extensive discussion of Section 2, Seventh and it most certainly does not indicate that Section 2, Seventh, as adopted, was intended to incorporate RLEA's exaggerated view of its role under ERTA and the Bankruptcy Act. The express terms of

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[7] As pointed out in this Court's recent decision in *Trans World Airways, Inc. v. IFFA*, 57 U.S.L.W. 4283 (U.S. Feb. 28, 1989), the legislative history of the 1934 amendments to the RLA deals mostly with the employees' representation and organization rights. *Id.* at 4287-88. Eastman's testimony is consistent with the legislative history of those amendments.

[8] The version Eastman supported provided that "[n]o carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees, except in the manner prescribed in Section 6 and in other provisions of this Act relating thereto." S. 3266, 73d Cong., 2d Sess. § 2, Seventh (1934). However, in its brief, RLEA neglects to state what Section 2, Seventh stated in its final form. The final version states that "[n]o carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, *as embodied in agreements* except in the manner prescribed in such agreements or in Section 156 of this title." 45 U.S.C. § 152, Seventh (emphasis added).

[9] RLEA's interpretation itself is contrary to the language of Section 2, Seventh, to the intent of its drafters and to the statements of labor's spokesman at the 1924 hearings, Donald R. Richberg. Richberg stated that the original bill that became the RLA provided that "[t]he mutual obligations of employer and employee which are to be enforced by law must be obligations that arise out of the voluntary agreements of employer and employee." *Hearings on S.2646 Before the Subcomm. of the Senate Comm. on Interstate Commerce*, 68th Cong., 1st Sess. 17 (1924).



Section 2, Seventh prohibit only those changes that affect the terms of agreements. RLEA's mischaracterization of the terms of Section 2, Seventh and the legislative history applicable to a rejected version of the provision seeks to give the present Section 2, Seventh a much broader scope and effect than was originally intended.

Thus, when the excerpts of legislative history cited by RLEA are put back into context, they provide no support for RLEA's contention that the RLA requires pre-implementation bargaining over the effects of a sale of the railroad, much less the "clear manifestation" of legislative intent that this Court has required before it will reach such a result.

### C. P&LE Was Not Required To Exhaust Section 6 Bargaining Over The Effects Of Its Decision Prior To Implementation

RLEA also argues that even if *First National Maintenance* were held to apply under the RLA, P&LE would still have to bargain over the effects of its decision prior to completing the sale to Railco. RLEA Br. at 23-24. RLEA reads *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960) ("*Telegraphers*"), to mandate the same result under the RLA. RLEA Br. at 24-26. While both *First National Maintenance* and *Telegraphers* found that the employers in those cases had a duty to bargain over the effects of certain decisions, neither case held that such bargaining had to be completed before the decisions could be implemented. In *First National Maintenance* this Court held only that the employer had to give the union a significant opportunity to bargain, with such bargaining to be conducted in a meaningful manner and at a meaningful time. 452 U.S. at 681-82. If such bargaining had to be completed before the decision could be implemented, the unions would have the same "powerful tool for achieving delay" that caused this Court to reject the decision-bargaining duty in the first place. *See* 452 U.S. at 681, 683. Recognizing this, the exhaustion of bargaining efforts over effects prior to implementation has not been required where it

would not be practical, and bargaining over effects has not been required at all where it would amount to bargaining over the decision itself.[10] *See* P&LE Br. at 23-24 n.7. In *Telegraphers*, this Court said nothing at all about the railroad's ability to implement its decision to close certain stations pending bargaining with the union over the effects of that decision.[11]

Imposing a duty on an employer to refrain from implementing a non-bargainable decision while it completes the "almost interminable" bargaining procedures of the RLA regarding the effects of that decision would lead to absurd results, as the present case illustrates. As already noted, bargaining over effects presents the same potential for interference with the employer's right to manage its affairs that this Court has found unjustified in the context of decision bargaining. Just as with decision bargaining, "the burden placed on the conduct of the business" by a duty to exhaust bargaining over the effects of a decision prior to implementation outweighs any possible benefit to

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[10]Since *First National Maintenance* the NLRB has further defined the "effects" bargaining obligation of an employer. In *Litton Financial Printing Division*, 286 N.L.R.B. No. 79 (1987), the NLRB recognized that those "effects" of a non-bargainable decision which are "inextricably intertwined" with the decision itself are not bargainable. The Board adopted a policy of requiring bargaining over effects proposals only if the scope of those proposals and resultant bargaining does not "compromise the employer's interest in 'unencumbered decision making'." Slip op. at 12. *See also Otis Elevator*, 269 N.L.R.B. 891 (1984)(test to determine bargainability of effects proposal is whether proposals can be addressed exclusive of the decision).

[11]Unlike P&LE, the railroad in *Telegraphers* did not plan to go out of business or make significant changes in the scope or direction of its business; rather, it intended only to close certain stations along a stretch of track over which it would continue to operate. Thus, the elimination of stations and jobs at issue in *Telegraphers* is comparable to the change in the locations at which employees were to report to work in *Detroit & Toledo Shore Line v. UTU*, 396 U.S. 142 (1969), which this Court ruled could not occur without exhaustion of Section 6 procedures. In neither case was the action at issue subject to the ICC's jurisdiction. Requiring bargaining in such a situation would in no way undercut P&LE's position here, since P&LE is not merely changing a working condition in an on-going operation, but rather going out of business pursuant to an ICC order.



labor-management relations that such bargaining might bring. *See First National Maintenance*, 452 U.S. at 679, 686. This is especially true under the RLA, the "purposely long and drawn out" bargaining procedures of which would provide an ideal method of achieving the unions' "practical purpose" in such circumstances, *i.e.*, "to delay or halt the closing." *Id.* at 681. Because few decisions regarding the "scope or direction of the enterprise" can await the exhaustion of Section 6 procedures, a requirement that an employer exhaust bargaining over effects before implementing a non-bargainable decision would as a practical matter eliminate any distinction between decision and effects bargaining under the RLA, and would force RLA employers to bargain with rail labor over virtually every management decision that could be construed to have any impact at all on employees. It would, in short, make "the elected union representative . . . an equal partner in the running of the business enterprise in which the union's members are employed." *Id.* at 676.

The potential for abuse under RLEA's interpretation is tremendous. For example, an employer that had successfully resisted previous collective bargaining efforts by its unions to gain employee benefits in the event it went out of business could still be prevented from doing so by the mere filing by those same unions of yet another such proposal at the time the employer decided to act. Indeed, even an employer that had sought to avoid this result by acceding to union demands for employee protections in pre-decision bargaining could still find itself blocked if, in the context of the actual transaction, the unions were able to identify and proposed to bargain over some effect that had not been anticipated.

As noted by Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964), management makes innumerable decisions that do not directly involve "rates of pay, rules or working conditions" yet in some way affect employees. Such decisions would give rise, in RLEA's view, to a duty to exhaust bargaining over effects before management can act. The same harm that caused this Court in

*First National Maintenance* to reject a duty to bargain over such decisions requires that this Court also reject RLEA's claim that bargaining over effects must be exhausted prior to their implementation.

## II. P&LE'S EXERCISE OF ITS RIGHT TO GO OUT OF BUSINESS AS A RAILROAD AND ABOLISH UNNEEDED JOBS IS NOT DEPENDENT UPON ITS COLLECTIVE BARGAINING AGREEMENTS OR ITS PAST PRACTICES

Although superficially simple and seemingly straightforward, the view of the status quo espoused by RLEA and *amicus* AFL-CIO represents a startling innovation. If accepted by this Court, it would convert what Congress intended to be a passive shield against hasty and potentially disruptive unilateral action into a potent sword that would give unions a veto power over every management decision that conceivably has any effect on employees. Anytime a "carrier seeks to do something which it has never done before," RLEA Br. at 44, its unions could demand that the carrier exhaust the "almost interminable" bargaining procedures of the RLA before implementing its decision. Innumerable quintessential management decisions over which unions have never been thought to have a say, such as decisions to drop unprofitable operations, sell capital assets, or even file for bankruptcy -- all of which may have a direct effect on employees, and many of which may be subject to ICC jurisdiction -- will suddenly have to await union approval before being implemented. Congress never intended such a result, and neither Section 6 of the RLA nor this Court's prior decisions requires it.

### A. Except To the Extent Management May Have Bargained It Away, Management Retains Its Inherent Right To Determine The Scope And Direction Of Its Business Operations

According to RLEA and *amicus* AFL-CIO, a railroad may exercise its managerial prerogatives only to the extent such



prerogatives are embodied in agreements or have previously been exercised in such a way as to become part of the "past practice" between the parties. RLEA Br. at 43-44; AFL-CIO Br. at 26. If management has not thus preserved its rights, the argument goes, then it may not for the first time exercise those rights during a period in which the status quo is in effect. Incredibly, RLEA and *amicus* AFL-CIO contend that such a disabling status quo period can be imposed on the employer merely by filing a notice seeking to amend the contract to restrict the very right at issue.

This Court's decisions in *Darlington*, *J.I. Case*, *First National Maintenance*, and numerous other cases[12] implicitly recognize that management always retains the ability to make and implement certain inherently managerial decisions, and does not forfeit the right to make those decisions just because the occasion to exercise its rights does not arise. Thus, in *First National Maintenance*, this Court referred to "petitioner's retained freedom to manage its affairs unrelated to employment." 452 U.S. at 677 (footnote omitted). Recognizing that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business," *id.* at 678-79 (footnote omitted), this Court there implicitly held that management could implement certain fundamental business decisions even where those decisions "have a substantial impact on . . . employment." *Id.* In another context, this Court referred to "the

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[12] As this Court recently explained,

> Both employers and employees come to the bargaining table with rights under state law that form a "backdrop" for their negotiations . . . absent a collective-bargaining agreement, for instance, state common law generally permits an employer to run the work-place as it wishes. The employer enjoys this authority without having to bargain for it.

*Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2222 (1987). "The scope of the management's prerogative is often not spelled out in collective bargaining agreements, but the prerogative exists implicitly to some extent in all such agreements." *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 35 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964).

These principles apply equally under the RLA. *See, e.g., Texas & N.O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 571 (1930) ("The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them."); *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d at 21, 35 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Railroad labor arbitrations have long recognized that a carrier retains its management prerogatives to the extent that they have not been limited by agreement or by law. For example, in *System Federation No. 162 v. Southern Pacific Lines in Texas and Louisiana*, Award No. 3630, National Railroad Adjustment Board ("NRAB") 2d Div. (Jan. 9, 1961), the arbitrator explained as follows:

> It is a fundamental principle of the employer-employe [sic] relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law.

Similarly, in *BRAC v. Southern Pacific Transportation Co.*, Award No. 15, Public Law Board No. 843 (Aug. 30, 1984), the arbitrator stated:

> We conclude that all inherent rights of management that the Carrier has not contracted away still remain with it. The carrier is free to exercise its managerial prerogatives unless its acts are limited by law or by the Agreement between the parties. We cannot, by interpretation, add a prohibition against managerial prerogatives which does not appear in the Agreement between the parties.

To the extent the "practices and customs of the railroads and their employees" help to determine what is bargainable, *see Tele-*



*graphers*, 362 U.S. at 338, these arbitration decisions demonstrate that, contrary to the contentions of RLEA and *amicus* AFL-CIO, management retains its right to exercise its prerogatives except to the extent a limitation on that right appears in a collective bargaining agreement.[13] The right to make and implement fundamental decisions regarding the scope and direction of the enterprise thus is part of the status quo, and the exercise of that right therefore does not violate the status quo.

### B. The Loss Of Jobs That Results From A Management Decision, Approved By The ICC, Regarding The Scope And Direction Of The Business Does Not Violate The Status Quo

In *Shore Line*, this Court described the duty to maintain the status quo that takes effect whenever parties are involved in an RLA major dispute as follows:

> The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

396 U.S. at 152-53. According to RLEA and the court of appeals, the "actual, objective working conditions and practices, broadly conceived" in effect at the time this dispute arose must include "the

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[13] *See also BRAC v. Railroad Perishable Inspection Agency*, Award No. 23551, NRAB 3d Div. (March 10, 1982) ("Numerous awards of this Board have held that the carrier has the prerogative to determine when, where and by whom work will be performed. Unless prohibited by the negotiated agreement, it has the right to rearrange existing work assignments including the abolishment of unneeded positions."); *Transportation Communication Employees Union v. Soo Line R.R.Co.*, Award No. 19019, NRAB 3d Div. (Feb. 28, 1972) ("It is the right of an employer to abolish a position it has created unless to do so would be contrary to law or an agreement, express or implicit.").

very existence of the workers' jobs." RLEA Br. at 37. RLEA therefore concludes that the loss of jobs that would result if P&LE were to go out of business as a railroad would violate P&LE's status quo obligation.

As an initial matter it must be noted that whether or not the status quo includes "the very existence of the workers' jobs," it also includes: (1) P&LE's management prerogative to determine the scope and direction of its business; (2) collective bargaining agreements that concededly impose no restriction on P&LE's exercise of its management prerogative to abolish jobs no longer needed; (3) the Interstate Commerce Act, which vests exclusive authority to approve P&LE's decision to go out of business in the ICC; (4) rail labor's 50 year past practice of looking to the ICC to address the effects of transactions; and (5) an ICC decision authorizing P&LE to go out of business. Depriving P&LE of its pre-existing right to exercise its managerial prerogative is as much a change in the status quo as would be the loss of jobs "as well as . . . seniority and other contractual rights" on which RLEA relies. RLEA Br. at 39. RLEA's attempt to show a breach of the status quo fails, however, because incidental changes in working conditions, no matter how serious, that result from the exercise by management of its right to determine the scope and direction of its business do not violate the status quo. Moreover, the loss of jobs will not violate the status quo obligation that results from RLEA's own Section 6 notices because, unlike the union in *Shore Line*, RLEA is not trying to bring an "omitted case" into the written agreement, but rather is seeking to acquire protections and benefits that do not presently exist at all. RLEA has never suggested that P&LE ever agreed, implicitly or explicitly, to guarantee work or jobs. RLEA seeks to have the Court create job guarantees by reading them into the RLA itself.

RLEA characterizes P&LE's arguments as being identical to those rejected by this Court in *Shore Line*. The railroad in *Shore Line* was not, however, implementing an ICC-approved decision affecting the scope and direction of its business, but rather was simply changing an established run of the mill working condition,



*i.e.*, the location at which employees reported to work. In rejecting the railroad's claim that the status quo had to be determined solely on the basis of written agreements, this Court noted that in the railroad industry the parties frequently leave mutually acceptable rules and working conditions out of their written agreements. 396 U.S. at 153-54.

In *Shore Line* the railroad could not rely on the contract's silence concerning the location at which employees were to report to work because there was, in fact, an historical practice regarding that working condition. In contrast, management's right to change the scope and direction of its business is so fundamental that, in the absence of an express contractual restriction on that right, the status quo permits its exercise.[14] The possibility that jobs could be lost as a result of P&LE's exercise of that right was always part of the status quo. Thus, while the loss of jobs that would result from P&LE's decision would change the employment status of the affected employees, that loss of jobs is not the sort of change in working conditions that violates the status quo.

On the other hand, P&LE is not precluded from eliminating the jobs by reason of RLEA's Section 6 notices because the status quo that is involved by virtue of those notices does not include any present restriction on P&LE's right to proceed. It is rail labor, not P&LE, that is seeking by those notices to change existing practices and agreements, *see* AFL-CIO Br. at 20, and in this respect this case is very different from *Shore Line*. There is nothing unfair or "one-sided" about allowing P&LE to proceed in these circumstances. Rail labor could have sought these contract changes at any time in the past, before P&LE decided to terminate its status as a railroad. P&LE's unions have been aware for at least five years

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[14] It seems obvious that there can be no past practice of going out of business. An employer will exercise that right only once. The contracts themselves contain no limitation on that right. Consequently, there is no basis for the suggestion, *see* United States Br. at 26-27, that this case should be remanded for examination of the contracts and past practices where both parties to those agreements concede that the agreements do not cover this situation and as a matter of definition there is no past practice directly applicable.

that P&LE was in dire straits and might be sold.[15] Had P&LE's unions succeeded in obtaining these changes earlier, they would now be part of the existing agreements and hence part of the status quo that P&LE must observe. Having failed, for whatever reason, to seek and obtain these contract changes prior to P&LE's announcement, P&LE's unions cannot now be allowed to call "time out" in order to prevent P&LE from going forward while they belatedly pursue bargaining. The status quo provisions of the RLA were never meant to serve as an insurance policy for shortsighted labor representatives.

## III. RLEA'S MINIMUM STANDARDS ANALYSIS FAILS TO "MAKE SENSE" OF THE ICA AND THE RLA

RLEA argues that there is no conflict between its interpretation of the RLA and the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* ("ICA"), because the ICA is merely a form of "minimum standards legislation." RLEA Br. at 50. According to RLEA, the labor protective conditions imposed by the ICC pursuant to the ICA to address the effects on employees from ICC-regulated transactions are a "floor" binding upon carriers, but not on unions, who are free to accept the protections imposed by the ICC or to bargain for more generous benefits under the RLA. There is no basis in the ICA or its legislative history to support RLEA's minimum standards analysis. RLEA's minimum standards analysis also fails to reconcile the fundamental conflicts between the ICA and the RLA, as RLEA would have the RLA construed. Ironically, through its minimum standards analysis, RLEA proves P&LE's point that, in an ICC-regulated transaction, a carrier's employees are limited to their then existing collectively bargained protections and whatever labor protections are imposed by the ICC.

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[15] For example, as demonstrated by P&LE President Gordon E. Neuenschwander's testimony, P&LE's employees agreed to certain concessions in the past to keep the railroad operating. J.A. 87-88.



### A. RLEA's Minimum Standards Analysis Is Not Supported By The ICA, Its Legislative History Or Any Judicial Or Administrative Precedent

RLEA's minimum standards theory is conceptually flawed at its outset, because the ICA does not simply fix a minimum standard for protective benefits, but grants the ICC broad discretion to fashion the level of labor protection appropriate in the different types of transactions subject to the ICC's exclusive jurisdiction. Even in those classes of transactions where Congress has established a minimum level, as in mergers, 49 U.S.C. § 11347, Congress has left to the ICC discretion to require greater protections in appropriate cases. *See, e.g., RLEA v. United States*, 675 F.2d 1248, 1256 (D.C. Cir. 1982). More significantly for this case, Congress has left the ICC complete discretion to determine what protections should be required, if any, in the sale of a rail line to a non-carrier pursuant to ICA Section 10901. In the exercise of that discretion, the ICC determined in *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd, Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) ("*Ex Parte No. 392*"), that no labor protections should be imposed on sales of marginal lines to new entrants, like Railco, absent a showing of exceptional circumstances by labor. *Id.* at 815. RLEA elected not to even attempt such a showing here. The fact that the ICC did not, therefore, impose any labor protective conditions did not mean that the ICC established a floor of zero protection. It meant that, in the absence of a showing by RLEA, the ICC's finding in *Ex Parte No. 392* that labor protection conditions would make the sale of marginal rail lines uneconomical, and lead to their abandonment, applied to this sale.

### B. Congress Did Not Intend The ICC To Implement Its Orders Through The RLA

#### 1. The Procedures Of Section 11347 Do Not Apply Here

RLEA argues that the ICA and RLA are complimentary, because the ICC-prescribed labor protection conditions supposedly incorporate the RLA's notice and status quo requirements, and because Congress and the ICC have used RLA mandated bargaining to implement the "minimum standards" conditions. These RLEA claims do not withstand scrutiny. As a preliminary matter, RLEA's entire minimum standards analysis is premised on ICA provisions that have no application to this case. RLEA traces the ICA's provisions regarding a minimum level of labor protective conditions in railroad mergers and consolidations, 49 U.S.C. § 11347, from ERTA through the Washington Job Protection Agreement ("WJPA") to Section 11347 in its present form. These requirements, however, did not even have any application to the sale of lines to Railco, which, as RLEA itself recognizes, RLEA Br. at 64, was subject to Section 10901, not the ICA merger provisions.[16]

Furthermore, even when the ICC imposed discretionary labor protective conditions on Section 10901 line sales, those conditions did not require observance of the RLA's notice, bargaining and status quo requirements or that the purchaser assume the selling carrier's labor agreements. Typically, the ICC only imposed labor protective conditions on the selling carrier. The ICC's discretionary conditions, moreover, did not require the purchaser to negotiate

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[16] ERTA authorized the coordinator to order mergers. The WJPA only applied to "coordinations" between railroads signatory to that agreement. Neither had any application to sales of rail lines to a non-carrier. Moreover, the WJPA has since been incorporated into the ICC's merger labor protective conditions and "[t]he absence of any separate enforceable validity of the WJPA conditions has thus been an accepted aspect of labor relations under the Interstate Commerce Act for a substantial period of time." *Maine Central R.R. Co., Georgia Pacific Corp., Canadian Pacific Ltd. and Springfield Terminal Ry. Co.--Exemption from 49 U.S.C. 11342 and 11343*, ICC Finance Docket No. 30502, (served Sept. 16, 1985), slip op. at 5, *aff'd, RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987).



with the seller's unions or preserve wages or working conditions that had prevailed on the selling carrier. The new carrier was free to select its own workforce and establish its own terms of employment.[17]

#### 2. Section 11347 Labor Protections Are Not Implemented Through The RLA Bargaining Process

In any event, RLEA also incorrectly states that the labor protective conditions found by the ICC to satisfy Section 11347's minimum requirements incorporate the RLA notice, bargaining and status quo requirements or preserve collective bargaining agreements. The standard conditions imposed in mergers are the "*New York Dock*" conditions. *New York Dock Ry.--Control--Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd, New York Dock Ry. v. United States*, 609 F. 2d 83 (2d Cir. 1979). The standard conditions imposed in trackage rights and leases, also subject to Section 11347, are the "*Mendocino Coast*" conditions. *Mendocino Coast Ry., Inc.--Lease and Operation--California Western R.R.*, 360 I.C.C. 653 (1980), *aff'd, RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). While the *New York Dock* conditions incorporate the requirement of the now defunct Washington Job Protection Agreement that the involved carriers give 90-days advance notice of the approved transaction and that the carriers and unions execute an implementing agreement before the transaction can be consum-

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[17] *See, e.g., Prairie Trunk Ry. Co.--Acquisition and Operation*, 348 I.C.C. 832, 852 (1977), *aff'd, Illinois v. United States*, 604 F.2d 519 (7th Cir. 1979) (ICC refuses to require purchaser to maintain wage agreements and bargain with seller's unions); *RLEA v. Durango & Silverton Narrow Gauge R.R.*, 363 I.C.C. 841 (1981), *aff'd, RLEA v. United States*, 697 F.2d 285 (10th Cir. 1983) (ICC refuses to require purchaser to bargain with seller's unions over selection of its workforce or continuation of agreements). Notwithstanding the ICC's refusal to further condition these sales as demanded by labor, the rail unions did not seek to enjoin them as violations of RLA notice, bargaining or status quo requirements, even though, after the sales, the rail lines were operated by different employees pursuant to different work rules and wages, as would have been the case had labor not blocked the sale to Railco.

mated, neither the conditions nor Section 11347 incorporates the statutory notice or status quo requirements of the RLA. Moreover, the negotiation of the implementing agreement is not pursuant to the RLA. If no agreement is reached within the 90-day period set by the *New York Dock* conditions, then an arbitrator appointed pursuant to those conditions imposes an agreement upon the parties. The arbitrator's decision is appealable to the ICC, *UTU v. Norfolk & Western Ry. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988), whose decision is in turn appealable to the courts of appeal, *IBEW v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988). Thus, the voluntary negotiations and mandatory arbitration conducted pursuant to *New York Dock* conditions differ significantly from the RLA major dispute procedures, because *New York Dock* conditions ensure that disputes over labor protection will be resolved and the transaction not be held up or blocked altogether. To further illustrate the difference between ICA and RLA bargaining, under the *Mendocino Coast* conditions the involved carriers are only required to give 20 days advance notice and can consummate the transaction at the end of that time even if no implementing agreement has yet been formed.

RLEA is also incorrect when it asserts that the ICC's mandatory protections require that in Section 11347 transactions all collective bargaining agreements must be preserved. As the RLEA knows, the ICC and arbitrators have interpreted the *New York Dock* conditions to permit an ICC implementing agreement to alter



existing collective bargaining agreement rights as necessary to allow the transaction to be implemented.[18]

RLEA's reliance on the proviso to Section 11347, which authorizes carriers and unions to negotiate labor protective arrangements in mergers, as "conclusively" establishing that ICC protections are a floor for RLA bargaining is pure nonsense. RLEA Br. at 55. RLEA claims that this proviso somehow imports the notice, bargaining and status quo requirements of the RLA into ICA merger proceedings. RLEA further claims that P&LE ignores this provision under which, according to RLEA, "rail labor may require the carrier to negotiate for a protective arrangement . . . ." RLEA Br. at 56. As noted above, P&LE does not need to "escape" the force of Section 11347's proviso since Section 11347 does not apply to the sale of P&LE's lines to Railco. Even if it did apply the proviso, which states the parties "may" make a protective arrangement, it certainly does not by its terms "authorize[ ] rail labor to demand that the carrier negotiate." RLEA Br. at 61.[19] The proviso allows, but does not require, that carriers and unions involved in mergers negotiate a labor protective arrangement to be imposed by the ICC as a condition of its merger approval, in lieu of the labor protective conditions the ICC would otherwise impose.

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[18] *See, e.g., UTU v. Norfolk & Western Ry. Co.*, 822 F.2d at 1121-23. *See also CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Indus.*, ICC Finance Docket No. 28905 (Sub-No. 22) (served June 23, 1988), *appeal pend'g, Brotherhood of Railway Carmen v. ICC*, No. 88-1724 (D.C. Cir. argument scheduled April 25, 1989); *Norfolk Southern Corp.--Control*, ICC Finance Docket No. 29430 (Sub-No. 20) (served June 10, 1988), *appeal pend'g, Am. Train Dispatchers Ass'n v. ICC*, No. 88-1694 (D.C. Cir. argument scheduled April 25, 1989). By flatly stating that, since 1976, the ICC's mandatory protections require the continuation of agreements, RLEA Br. at 65 n.45, RLEA may be inviting this Court to express an opinion on this issue, which is irrelevant to this case but is pending in the above cited appeals.

[19] RLEA also erroneously asserts that Congress "has authorized rail labor to demand that the carrier negotiate" in all the ICA provisions mandating labor protection. RLEA Br. at 61. Sections 10903(b)(2) and 10910(j), which mandate a minimum level of protection in, respectively, abandonments and feeder line sales, do not even contain a proviso such as found in Section 11347.

While the proviso has been in the statute since 1940, RLEA cites no authority for its novel construction for the simple reason there is none. Indeed, the ICC rejected RLEA's construction of Section 11347 long ago. For example, in *St. Louis Southwestern Ry.--Purchase--Alton & Southern R.R.*, 342 I.C.C. 498, 521 (1972), the ICC refused RLEA's "request that we direct the applicants to negotiate protective agreements for the benefit of affected employees . . . ," explaining that:

> [t]he employees have the right under Section 5(2)(f) [now § 11347] to negotiate the type of protection they desire, but this is a voluntary action. Under Section 5(2)(f), however, they have no absolute right that would require us to direct the carrier or carriers to negotiate a protective agreement.

*Accord, Illinois Central Gulf R. Co.--Acquisition--Gulf, Mobile & Ohio R.R. Co.*, 338 I.C.C. 805, 862 (1971) ("[Section 11347] does not create in the employees an absolute right to negotiated protection.").[20]

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[20]RLEA cites several ICC merger decisions where the carrier and unions entered voluntary merger protective agreements providing for protections in excess of the statutory minimum. RLEA Br. at 52. In none of these cases, however, were the carriers compelled to negotiate the agreement. The carriers entered these agreements voluntarily in order to obtain labor's support for the merger. In other merger cases, and in all recent ones, the carriers and unions have not negotiated voluntary merger protective arrangements. Instead, unions have petitioned the ICC to impose protections greater than the standard protection in merger cases. Even though the ICC determined that its standard conditions were adequate in these cases, the unions never asserted a right to compel bargaining under Section 11347 or under the RLA for protections more generous than the ICC applied; nor did labor seek to enjoin these transactions as violative of the RLA. *See, e.g., Guilford Transportation Indus.--Control--D&H Ry. Co.*, 366 I.C.C. 396, 405 (1982) (no exceptional circumstances to warrant greater protections); *Norfolk & Western Ry. Co.--Purchase--Illinois Terminal R.R.*, 363 I.C.C. 882, 889-90 (1981); *CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Indus.*, 363 I.C.C. 518, 590 (1980) (ICC declines union request for extended protective period and greater relocation benefits); *Missouri Pacific R.R.--Merger--The T&P Ry. Co.*, 348 I.C.C. 414, 429-30 (1976) (no basis for attrition-type conditions); *Chesapeake & Ohio Ry.--Control--B&O R.R.*, 317 I.C.C. 261, 285-88 (1962) (ICC refuses union requests for attrition-type conditions).



RLEA's whimsical notion that the ICA incorporated the RLA's notice, bargaining and status quo requirements is directly refuted by the legislative history of Section 11347. In ERTA, Congress expressly preserved labor's RLA rights, even though it preempted other laws that might interfere with a railroad merger ordered under ERTA. Section 10 provided that "nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." 48 Stat. 215. During consideration of legislation to replace ERTA, legislation which ultimately took the form of the 1940 Transportation Act, 54 Stat. 898, Commissioner Eastman recommended that this same proviso be incorporated into new legislation. Contrary to RLEA's erroneous assertion, RLEA Br. at 56, Congress expressly rejected that recommendation. P&LE Br. at 41 & n.24.

Indeed, to leave merger protective arrangements solely to RLA bargaining would have completely frustrated the 1940 Act by allowing rail unions to block rail mergers. For this reason, the Sixth Circuit rejected any notion that the RLA governed a merger protective agreement negotiated under Section 11347 in *Nemitz v. Norfolk & Western Ry. Co.*, 436 F.2d 841, 845 (6th Cir.), *aff'd*, 404 U.S. 37 (1971) ("Since, under the [RLA], employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the [RLA] to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore should not be applied."). This Court's affirmance recognized that voluntary protective agreements were formed pursuant to the "machinery" of the ICA, not the RLA,

had to be reviewed by the ICC, and became part of the ICC's order. 404 U.S. at 43.[21]

Thus, RLEA has failed to show that the ICC's labor protective conditions incorporate or somehow reflect the RLA's major dispute procedures. RLEA's review of the ICA, while replete with error, does confirm that unions have historically looked solely to the ICC to address the impact on labor from ICC-approved transactions and, if dissatisfied with the level of protections imposed by the ICC, they have exercised their right to appeal the ICC decision or have lobbied Congress to amend the ICA to require greater protections. For example, RLEA concedes that when the ICC failed to require sufficiently generous protective benefits, "rail labor returned to Congress . . . for amendment of the ICA's labor protection provisions." RLEA Br. at 53. RLEA offers no explanation why, if the ICC protections were merely a "floor" and not a "ceiling," and "rail labor should have a right to devise its own solutions to the impact of ICC-regulated transactions on employees," *id.* at 54, rail labor during the last 50 years did not simply serve Section 6 notices demanding greater protections, as in this case, and insist that RLA status quo requirements be observed until the RLA's bargaining, mediation and cooling off procedures had been exhausted. Labor's failure certainly cannot be explained away as satisfaction with ICC-formulated labor protective conditions. RLEA's own brief chronicles its dissatisfaction with ICC-prescribed protections.[22] RLEA Br. at 52-53. While RLEA suggests that labor "began to negotiate new [protective] arrangements" when the ICC failed, in

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[21]The ICC has held that it has the power to modify negotiated protective agreements if it finds that exceptional circumstances justify modification. *See, e.g., Norfolk & Western Ry. Co. and N.Y.C. & St. L. R.R.--Merger*, 347 I.C.C. 506, 512 (1974).

[22]To put RLEA's dissatisfaction in perspective, it should be noted that the ICC labor protective conditions provided for wage guarantees of up to six years for affected employees, even if there was no railroad work for them. *See, e.g., RLEA v. United States*, 675 F.2d 1248, 1251 (D.C. Cir. 1982). RLEA evidently is not satisfied unless the ICC requires attrition-type conditions, *i.e.*, no employees can be affected.



labor's eyes, to provide adequate protections, those arrangements were negotiated, not under the RLA, but pursuant to the ICA, and only in railroad merger cases when the railroad agreed to negotiate, as P&LE has previously explained.

### C. RLEA's Suggested Accommodation Of The Relevant Statutes Frustrates National Transportation Policy

In the final analysis, RLEA has failed to explain how the illogical results of its minimum standards analysis "'make sense' in combination," of the ICA and RLA. *United States v. Fausto*, 108 S. Ct. 668, 676 (1988). For example, under the logic of RLEA's harmonization of the two statutes, unions could petition the ICC for labor protections and, after the conclusion of ICC proceedings, even if mandatory protections were imposed, *e.g.*, because the transaction was subject to Section 10903(b)(2) or Section 11347, rail labor could then simply serve a Section 6 notice proposing different conditions than those required by the ICA or the ICC and insist that the transaction not be consummated until exhaustion of the RLA's "purposely long and drawn out" procedures.

The affected carrier would find itself in the same position as does P&LE. It must either agree to the new conditions or forego the transaction. Moreover, at the end of the RLA bargaining procedures, the union could strike if still not fully satisfied, or because it simply opposed the transaction altogether. Here, for instance, RLEA did not even avail itself of the opportunity to request discretionary protections; it opposed the sale through the strike weapon and with RLA litigation. Similarly, a union could participate in an arbitration under the ICC conditions, and, if dissatisfied with the result, strike.[23]

In *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987), this Court held that after exhaustion of the RLA bargaining process rail labor has extraordi-

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[23]Lest this seem outlandish, RLEA took this position before this Court in its petition for a writ of certiorari from *UTU v. Norfolk & Western Ry. Co.*, 822 F.2d at 1114, Pet. for Writ of Certiorari at 20-21, No. 87-689 (filed Oct. 28, 1987).

nary weapons including the right to engage in secondary picketing. It "makes no sense" that Congress intended that rail labor can use this extraordinary strike weapon, or its threat, against carriers involved in an ICC-approved transaction, or against the entire railroad industry, or even airline industry as well, if dissatisfied with that transaction. Neither RLEA nor the United States explains why rail labor, unlike any other group affected by ICC decisions, is not bound by the ICA procedures, particularly when Congress has provided rail labor with an extraordinary remedy, the ability to seek labor protective conditions under the ICA. *Cf. ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360, 2377-78 & n.15 (1987) (Stevens, J., concurring)(four Justices find unions which failed to present claimed RLA rights in ICC proceedings slept on their rights). Contrary to RLEA's complaint, the ICA process is not "one-sided" and "uneven" simply because labor does not always obtain all that it asks from Congress or the ICC.[24] Furthermore, contrary to RLEA's implication, meaningful judicial review of the ICC's labor protection decisions, as with all ICC orders, is available. 28 U.S.C. § 2342(5). RLEA does not explain why judicial review is inadequate for labor, when all others unhappy with an ICC order are limited by statute to this remedy. Moreover, neither RLEA nor the United States explains why, if Congress intended the RLA as the process by which labor would obtain benefits addressing the effects of ICC-regulated transactions, it was necessary to establish a "floor" for such bargaining, especially when, in the case of mandatory protections, that "floor" consists of protections unprecedented in American industry. It is RLEA's position that is truly "one-sided," because under RLEA's view, only carriers are bound by the mandatory or discretionary labor protection "floor" required by the ICC, while labor would be free to bargain on the upside, with no downside below that floor.

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[24]For example, RLEA complains the ICC has never imposed discretionary labor protections in an *Ex Parte No. 392* transaction. RLEA does not say, however, whether labor has ever tried to show the required exceptional circumstances in these sales. It did not make such an effort here.



Contrary to the assertion of RLEA and the United States, the conclusion that Congress intended rail labor to look to the ICC to obtain labor protective conditions does not "repeal by implication" the statutory text of the RLA. As P&LE has explained, nothing in that text gives unions the right to insist that carriers forego management decisions subject to the ICA until the RLA's bargaining processes are exhausted. Thus, the repeal by implication doctrine does not apply here. At most, this case presents a question of accommodation, and P&LE presents a proper accommodation of the RLA and ICA. When a railroad is a going concern, labor can exercise its RLA rights to bargain over rates of pay, rules and working conditions. However, when the railroad decides to go out of business as a carrier, labor must petition the ICC to obtain labor protection beyond that contained in existing agreements. If that carrier's operations are taken over by a new company, then the employees' bargaining and representation rights with the new employer are again fully subject to the RLA. This accommodation gives effect to the purposes of both the ICA and RLA, while RLEA would effectively nullify the ICC's ability to implement the policies and purposes of the ICA.

## IV. THE DISTRICT COURT'S INJUNCTION WAS A COLLATERAL ATTACK UPON THE ICC'S JURISDICTION AND ORDERS

RLEA argues that the district court's injunction was not a collateral attack because the ICC merely exempted P&LE's purchaser, Railco, from the filing requirements of Section 10901 and because the ICC does not have jurisdiction to enforce the RLA. However, as previously shown, the ICC had exclusive jurisdiction over the sale, including the effects on employees and to address all of the relief P&LE's unions were seeking in their Section 6 notices. Therefore, the district court injunction was a collateral attack upon the ICC orders approving the sale and allowing it to go forward on an expeditious basis without the imposition of labor protective conditions.

Additionally, the ICC's exemption order did not merely excuse Railco from Section 10901's filing requirements. Because that exemption was required by the ICC before P&LE could sell its rail lines, it was the functional equivalent of an approval under Section 10901. Railco had to obtain either a certificate of public convenience and necessity under Section 10901 or an exemption from that requirement. Moreover, even though the ICC acted by way of its exemption authority, pursuant to Section 10505, the ICC retained jurisdiction over the sale and its broad authority to impose conditions upon that sale. *See, e.g., Ex Parte No. 392*, 1 I.C.C. 2d at 812 ("the potential for total or partial reimposition of regulation is always present.").[25] Indeed, in the ICC's September 25, 1987 Order refusing to stay the sale, the ICC, at RLEA's request, conditioned the sale upon the requirement that P&LE retain its corporate existence until after the ICC had considered RLEA's petition to revoke Railco's exemption. RLEA's brief does not even mention this ICC order, which was clearly vacated as a practical matter by the district court injunction.

## V. THE NORRIS-LA GUARDIA ACT DOES NOT PROHIBIT AN INJUNCTION AGAINST AN ILLEGAL STRIKE

It is true, as RLEA and *amicus* AFL-CIO assert, that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* ("NLGA"), withdrew from federal courts the ability to prohibit strikes arising out of labor disputes. 29 U.S.C. § 104. This court has long held, however, that the NLGA, like any other statute, must be accommodated to other legislative schemes. A proper accommodation of NLGA with the ICA and the RLA demonstrates that the district court was correct when it enjoined the strike on ICA grounds and it would have been

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[25]Moreover, the fact that the ICC exercises its Section 10505 exemption authority does not create a void to be filled by other federal or state law. The ICC retains jurisdiction and any requests for relief must be presented to the ICC. *See, e.g., G&T Terminals, Inc. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234-35 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988).



correct to enjoin it on the alternative RLA ground. *See* P&LE Br. at 56-66.

First, P&LE had no duty whatsoever to bargain with its unions since the notices were a transparent attempt to bargain over the decision itself. *See Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52 (2d Cir. 1976). However, even if P&LE has a duty to bargain over the effects of its non-bargainable decision, under the RLA the parties are prohibited from utilizing self-help until the bargaining process is exhausted. *Local 553, Transport Workers Union v. Eastern Air Lines, Inc.*, 695 F.2d 668, 674 (2d Cir. 1988). Thus, in either situation, the unions' strike could be properly enjoined as a violation of the RLA.

The strike was also enjoinable as a violation of the ICA. P&LE Br. at 56-64. In enacting the ICA, Congress created a complete set of administrative procedures by which labor organizations, like other parties, can petition the ICC for special protective provisions. If those protections are insufficient, they can appeal ICC actions to a federal court. Further, if conditions are imposed, disputes over their meaning are resolved by ICC arbitrations. The ICA is replete with the type of administrative remedies that this Court has ruled are important enough to take precedence over the NLGA. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Therefore, the strike by P&LE's unions was properly enjoinable on at least two grounds, neither of which conflicted with the NLGA's policy or goals.

## VI. P&LE'S TAKINGS CLAUSE CLAIM IS NOT DEFEATED BY THE FACT THAT RAILROADS ARE SUBJECT TO ICC REGULATION

RLEA asserts that the fact that P&LE is subject to regulation and restrictions on its ability to exit the rail industry as desired is the "death knell" for P&LE's takings claim. RLEA Br. at 22 n.16. RLEA's cursory treatment of P&LE's claim fails to address the issues raised by P&LE's Opening Brief and is, therefore, unpersuasive. Indeed, as the United States indicates, the RLA and any obligations arising thereunder should be construed to avoid the

possibility of an unlawful taking of property in this case.[26] United States Br. at 28. However, while waiting for the court order to be either properly limited or reversed, P&LE continues to lose money, its assets continue to erode, and its rights in its property are improperly restricted. *See* P&LE Br. at 66-70.

RLEA is correct that a reasonable delay in the implementation of a regulatory program must be tolerated. RLEA Br. at 22 n.16. However, as this Court has noted, there is a point where the loss of property becomes "unreasonable even in light of the public interest" served by requiring the carrier to remain in business. *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 124 (1974). There are constitutional limitations on the delay to which a carrier going out of business can be subjected. The delay associated with the ICC approval may have been constitutionally permissible. However, the district court injunction granted RLEA total control of the transaction because, until the unions agree to the terms of a prospective sale, P&LE is forced to engage in RLA bargaining which "bleed[s] away [its] resources in a continuing status quo while hope[s] of preserving any service, or any jobs, seep[ ] away." *RLEA v. P&LE*, App. II at 61a (Hutchinson, J., dissenting). Meanwhile, its unions have absolutely no incentive ever to reach agreement, because that would spell the end of their members' jobs with P&LE. *See First National Maintenance*, 452 U.S. at 681. Thus, the "point" at which the delay referred to by this Court becomes unreasonable has been reached in this case and the improper implementation of RLA bargaining obligations has taken P&LE's property in violation of the Fifth Amendment.

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[26]The United States is incorrect in asserting that the factual record is not sufficiently developed to support P&LE's takings argument. United States Br. at 28. The record in this case is replete with references to P&LE's precarious financial condition and the detrimental effect that the court-ordered bargaining had on that condition. *See, e.g.*, J.A. 16, 22, 29, 70, 82-83, 131, 143-44, 168, 191; Petitioner's Supplemental Brief at App. C (filed Nov. 22, 1988); *see also RLEA v. P&LE*, App. II at 61a-62a (Hutchinson, J., dissenting). Indeed, the only question raised by RLEA was not whether P&LE's financial distress was genuine, but whether P&LE was already insolvent. Therefore, the record is sufficiently developed for this Court to address P&LE's claim that its property has been taken by virtue of the court order.



## CONCLUSION

Failing in Congress and in the courts of appeals to reverse the ICC's post-Staggers Act policies, RLEA has embarked on a course of RLA-based litigation whose purpose is to give RLEA the right to veto ICC transactions where it is dissatisfied with the manner in which the ICC exercises its discretion. RLEA's attempt to disrupt the ICC process and turn back the economic consequences of lessened regulation through the unprecedented assertion and expansion of RLA bargaining rights should not be countenanced. National transportation policy must continue to be determined by Congress and the ICC, not by RLEA and the RLA. The judgments in Nos. 87-1589 and 87-1888 should be reversed.

Respectfully submitted,

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